

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 34

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte DIETMAR PRZYTULLA

Appeal No. 2004-1804
Application No. 09/525,002

HEARD: JANUARY 26, 2005

Before FRANKFORT, PATE and BAHR, Administrative Patent Judges.
BAHR, Administrative Patent Judge.

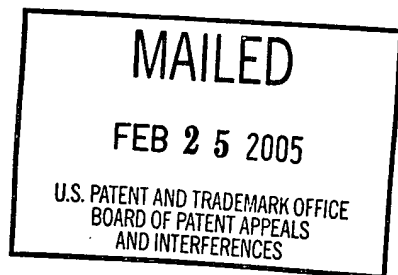
DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 3-23.

Claims 1 and 2, the only other claims pending in this application, stand allowed.

BACKGROUND

The appellant's invention relates to a cylindrical, blow-molded lidded barrel provided with an upper barrel edge of special design to permit application of barrel-gripping tools generally employed for bung barrels while also providing improved liquid



sealing properties (specification, page 5). A copy of the claims under appeal is set forth in the appendix to the appellant's brief.

The examiner relied upon the following prior art references in rejecting the appealed claims:

Fehres	3,696,962	Oct. 10, 1972
Hammes et al. (Hammes)	4,177,934	Dec. 11, 1979

The following rejections are before us for review.¹

Claims 3-14 and 16-23 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Fehres.

Claims 3 and 18 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Hammes.

Claim 15 stands rejected under 35 U.S.C. § 103 as being unpatentable over Fehres in view of Hammes.

Claims 4 and 19 stand rejected under 35 U.S.C. § 103 as being unpatentable over Hammes.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the answer

¹ As to appellant's assertion that the color-coded attachments to the examiner's answer appear to present new grounds of rejection, we note that "[a]ny allegation that an examiner's answer contains an impermissible new ground of rejection is waived if not timely (37 CFR 1.181(f)) raised by way of a petition under 37 CFR 1.181(a)." Manual of Patent Examining Procedure § 1208.01.

(Paper No. 23) for the examiner's complete reasoning in support of the rejections and to the brief and reply brief (Paper Nos. 22 and 25) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

Turning first to the examiner's rejection of claims 3-14 and 16-23 as being anticipated by Fehres, appellant argues on page 5 of the brief that Fehres is silent with respect to "a rib projecting radially outwardly beyond an outward extent of the first and second portions" as recited in claims 3, 4, 18 and 19 and with respect to a "rib extending radially outwardly beyond an outward extent of said first and second chime wall" as recited in claims 5 and 10. As for the rejection of claims 3 and 18 as being anticipated by Hammes, appellant argues on page 7 of the brief that Hammes is silent with respect to "an inner edge (27a) of the first portion (27) extending radially inward of the entire second portion (29), and a rib projecting radially outwardly beyond an outward extent of the first and second portions" as recited in claims 3 and 18.

In this regard, we note that anticipation does not require that the reference teach what the subject application teaches, but only that the claim read on something

disclosed in the reference, i.e., that all of the limitations in the claim be found in or fully met by the reference. Kalman v. Kimberly Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984). Further, while anticipation requires the disclosure of each and every limitation of the claim at issue in a single prior art reference, it does not require such disclosure *in haec verba*. In re Bode, 550 F.2d 656, 660, 193 USPQ 12, 16 (CCPA 1977). Accordingly, that Fehres and Hammes do not describe their profiled rim 2 and flange 3, respectively, by reference to terms such as first and second portions and rib is of no moment in the determination of whether the claimed subject matter is in fact anticipated by Fehres or by Hammes.

The examiner has appended to the answer "COLOR CODED FIGURE 1" AND "COLOR CODED FIGURE 2" (from Figure 3 of Fehres) and "COLOR CODED FIGURE 3" (from Figure 1 of Hammes), using the color orange and the numeral 1 to denote structure corresponding to the "first portion" recited in appellant's claims, the color blue and the numeral 2 to denote structure corresponding to the "second portion" recited in appellant's claims and the color yellow and the numeral 3 to denote structure corresponding to the "rib" recited in appellant's claims. From our review of "COLOR CODED FIGURE 1" AND "COLOR CODED FIGURE 2," we have determined that the orange portion of Fehres' rim 2 is a first portion or chime wall of an upper barrel edge extending radially away from the barrel body and having a downwardly facing surface,

the blue portion is a second portion or chime wall of the upper barrel edge extending upwardly from the first or orange portion, with an inner edge of the first portion (e.g., the intersection of recessed portion 8 and the inner wall surface of the first portion) extending radially inward of the entire second portion, and the yellow portion constitutes a rib having both an upper and a lower surface projecting radially outwardly beyond an outward extent of the first and second portions, as called for in appellant's independent claims 3, 4, 5, 10, 18 and 19. Likewise, with reference to "COLOR CODED FIGURE 3, "the orange portion of Hammes' flange 3 is a first portion or chime wall of an upper barrel edge extending radially away from the barrel body and having a downwardly facing surface, the blue portion is a second portion or chime wall of the upper barrel edge extending upwardly from the first or orange portion, with an inner edge of the first portion (e.g., along the inner wall surface of the first portion) extending radially inward of the entire second portion, and the yellow portion constitutes a rib having both an upper and a lower surface projecting radially outwardly beyond an outward extent of the first and second portions, as called for in appellant's independent claims 3 and 18.

Appellant appears to be arguing on page 3 of the reply brief that the examiner has arbitrarily delineated various portions of Fehres' rim 2 and Hammes' flange 3 so as to meet appellant's claim language and, in particular, appears to be bothered by the fact that the examiner's delineations fail to include the portion of Hammes' profiled rim

2 extending radially outwardly from the blue or second portion or the neck portion 5 extending radially inwardly and upwardly of the second or blue portion of Hammes' flange 3. As for the examiner's characterization of the unitary rim 2 of Fehres and flange 3 of Hammes as including portions as delineated by the examiner, we find no error in this and observe that appellant has, in fact, similarly partitioned unitary structure in drafting the claims at issue. As for the presence in Fehres and Hammes of additional structure extending outwardly from the blue or second portion of Fehres' rim 2 and the neck portion 5 extending upwardly and radially inwardly of the blue or second portion of Hammes' flange 3, we agree with the examiner that such additional, unrecited structure is not precluded by appellant's claims, which use open-ended terminology such as "including" (claims 3, 5, 10, 18) and "having" (claims 4 and 19).²

For the foregoing reasons, we shall sustain the rejections of claims 3-5, 10, 18 and 19, as well as dependent claims 6-9, 11-14, 16, 17 and 20-23 which appellant has grouped therewith, as being anticipated by Fehres and claims 3 and 18 as being anticipated by Hammes.

We shall not, however, sustain the rejection of claims 4 and 19 as being unpatentable over Hammes. In order to meet the claim limitation that the second

² See In re Baxter, 656 F.2d 679, 686, 210 USPQ 795, 802 (CCPA 1981)(the transitional term "comprising" is inclusive or open-ended and does not exclude additional, unrecited elements); Ex parte Davis, 80 USPQ 448, 450 (Bd. App. 1948)("comprising" leaves "the claim open for the inclusion of unspecified ingredients even in major amounts").

portion extends upwardly from the first portion to define “an uppermost surface of the upper barrel edge,” the examiner has taken the position that it would have been obvious to remove Hammes’ neck portion 5 because, according to the examiner, portion 5 is not necessary “because the lid continues to be held upon the container body by retaining ring (4) and the elimination of portion 5 would save plastic molding materials” (answer, page 6). We share appellant’s view, as expressed on page 9 of the brief, that the combination of the walls 6, 7 and the neck portion 5 contribute to the sealing of the Hammes barrel and lid and find no suggestion whatsoever in Hammes to eliminate the neck portion so as to arrive at appellant’s invention.

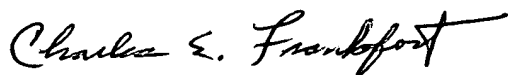
We also cannot sustain the examiner’s rejection of claim 15 as being unpatentable over Fehres in view of Hammes. Quite simply, we fail to perceive any teaching, suggestion or incentive in the applied references which would have motivated an artisan to modify the ridge 14 of Fehres’ profiled rim 2 in such a fashion as to meet the terms of claim 15. From our perspective, the only suggestion for putting the selected pieces from the references together in the manner proposed by the examiner is found in the luxury of hindsight accorded one who first viewed the appellant’s disclosure. This, of course, is not a proper basis for a rejection. See In re Fritch, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992).

CONCLUSION

To summarize, the rejections of claims 3-14 and 16-23 as being anticipated by Fehres and claims 3 and 18 as being anticipated by Hammes are affirmed and the rejections of claim 15 as being unpatentable over Fehres in view of Hammes and claims 4 and 19 as being unpatentable over Hammes are reversed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART



CHARLES E. FRANKFORT
Administrative Patent Judge



WILLIAM F. PATE, III
Administrative Patent Judge



JENNIFER D. BAHR
Administrative Patent Judge

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HENRY M FEIEREISEN, LLC
350 FIFTH AVENUE
SUITE 4714
NEW YORK, NY 10118

JDB/ki